IN THE

Supreme Court of the United States

October Term, 1971
No. 71-869

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

LEON M. COOPER,
617 West Sixth Street,
Los Angeles, Calif. 90017,
Attorney for The Deutsch Company, Electronic Components Division, Petitioner.

SUBJECT INDEX

	Page
Grounds for Rehearing	1
Discussion	4
A. The Status of the Law Prior to the Decision of the Court Below and the Recent Change in Board Policy	4
B. In Conformance With Its Prior Policy the Board Found the Subject Communication to Be a Violation of the Act While Conceding That the Letters Did Not Contain Any Threat of Reprisal, Force or Benefit	6
C. The Court Below Was the First Court to Hold as a Matter of Law That a Communication Which May Result in Union Disaffiliation Is Unlawful Regardless of Threat or Promise	7
D. The Presently Constituted Board Has Altered Its Position to Conform With the Directive of Section 8(c) by Finding That Informing Employees of Their Right to Disavow Union Support and Affirmatively Providing the Means to Do so Is Not a Violation of the Act in the Absence of Threat or Promise	8
Conclusion	10
Appendix. Pertinent Portion of Gaf Decision as Reported in 1972 CCH, NLRB Paragraph 23,853	App. p. 1

TABLE OF AUTHORITIES CITED

Cases

	Page
Gaf Corporation and International Union of Operating Engineers, AFL-CIO, Local 819; 195 N.L.R.B. No. 11 (Jan. 28, 1972)	1, 2, 3, 8, 9
S. H. Kress & Co. v. NLRB, 317 F.2d 225 (C.A.9, 1963)	6
P.R. Mallory & Co. v. NLRB, 389 F.2d 704 (C.A. 7, 1967)	10
NLRB v. J. L. Brandeis & Sons, 145 F.2d 556 (C.A.8, 1944)	8
NLRB v. Brookside Industries, Inc., 308 F.2d 224 (C.A.4, 1962)	5, 7
NLRB v. Golub Corp., 388 F.2d 921 (C.A.2, 1967)	10
NLRB v. Gotham Industries, 406 F.2d 1306 (C.A. 1, 1969)	8
NLRB v. Hawtherne Co., 404 F.2d 1205 (C.A.8, 1969)	8
NLRB v. Hobart Brothers Co., 372 F.2d 203 (C.A. 6, 1967)	8
NLRB v. Modern Plating Co., 358 F.2d 46 (C.A. 7, 1966)	10
NLRB v. San Co. San Bernardino, 215 F.2d 379 (C.A.9, 1954)	5, 7
NLRB v. TRW-Semiconductors, 385 F.2d 753 (C.A.9, 1967)	10
NLRB v. The Deutsch Company, 408 F.2d 684 (C.A.9, 1969)	5
NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941)	4

Page

NLRB v. Wilson Lumber Co., 355 F.2d 426 (C.A. 8, 1966) 10

Union Representatives v. NLRB, 339 F.2d 126 (C.A.2, 1964) 5, 7

Statutes

National Labor Relations Act, Sec. 7 6

National Labor Relations Act, Sec. 8(c) 2, 3, 4, 5, 7, 8

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-869

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

Petitioner presents its petition for rehearing of this Honorable Court's order dated March 20, 1972, denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Grounds for Rehearing.

On January 28, 1972, subsequent to the filing of Petition for Writ of Certiorari in this case, the National Labor Relations Board (hereinafter "the Board") in the case of *Gaf Corporation and International Union of Operating Engineers, AFL-CIO, Local 819*, 195 N.L.R.B. No. 11 (January 28, 1972), surrendered its longstanding policy that any employer expression which might lead to union disaffiliation was a *per se* violation of the Act by holding that in the absence of threat or promise informing employees of their right to with-

draw from a union and providing the means to do so is a protected activity. This decision was reached by a new three-man Board which had replaced the individuals who sat on the Board when the instant case was decided.

The addition of *Gissel* to the already confused question of what information or assistance an employer can extend to an employee in regard to union disaffiliation can only result in a chilling of employer communication. The very core of the Act is to preserve for employees the right to choose, with full knowledge of the facts, to join or not to join a union. Unless employers know to what extent they may participate in affecting these choices, their only safe option is to refrain from all communications. While *Gissel* suggests that the Board is finally willing to accept the free speech protection afforded by Section 8(c), the court below, which adopted the Board's pre-*Gissel* policy, is not willing to be bound by Congressional intent. Only this Court by granting Petition for Writ of Certiorari in this case can resolve the issue of the scope and extent of employer expression which lies at the very heart of labor-management relations in this country.

Historically, the Board has without exception taken the position that an employer may not engage in any expression, even if purely informational, which might in any manner negatively affect employee support for a union even if the expression is unaccompanied by any threat of reprisal or force or promise of benefit. Prior to the decision of the court below, the courts of appeal were equally adamant and consistent in holding that before any employer expression could be found actionable, including those which might lessen union support, the expression must contain a threat or promise —otherwise, the expression was protected and to be en-

encouraged by Section 8(c) of the Act. The court below broke with the traditional approach of the courts of appeal and ignored its own precedents by adopting the Board's position that any expression that might undermine employee support for a union is *a per se* violation of the Act regardless of the statutory protection afforded by Section 8(c) of the Act.

Now, subsequent to the filing of the Petition for Writ of Certiorari herein, the Board in *Gissel* has disavowed its prior policy and has conformed its position to that of the courts of appeal, except for the court below, by ruling that informing employees of their right to reject union affiliation and positively assisting employees in their right to disavow unionization is a protected right in the absence of threat or reprisal.

While this Court could simply remand this case to the court below to reconsider its decision in light of *Gissel*, the need for the Court to speak far outstrips the modest interests of the Petitioner. Providing employees with information as to their rights, including the right to disavow union affiliation, is a traditional and widespread practice which was originally upset by the decision of the court below and now has been reduced to havoc by the unpredictability generated by the recent reversal of the Board's position.

This Court has not since the enactment of Section 8(c) of the Act ruled upon the question of an employer's right or obligation to inform employees of their rights under the Act and, more importantly, this Court has never clearly enunciated the scope of Section 8(c) of the Act or the rights thereunder. The need for guidance from this Court has since the passage of Section 8(c) in 1947 become critical as labor-management relations has become the principal forum for economic debate.

DISCUSSION.

A. The Status of the Law Prior to the Decision of the Court Below and the Recent Change in Board Policy.

Prior to 1941, the Board required an employer to remain strictly neutral in labor-management relations and prohibited the employer from expressing its views as to the relative advantages and disadvantages of union affiliation or disaffiliation. By proscribing employer communications, the Board denied to employees the right to receive and utilize information and opinions supplied by one of the parties most interested in an organizational drive. Commencing in 1941 with the case of *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941), this Court admonished that an employer's communication could not be the basis for an unfair labor practice if the communication was unaccompanied by threat or promise.

The legislative history of Section 8(c) conclusively evidence that Congress felt that the Board was far too restrictive of the employer's right of free speech in the expression of his views on labor matters (See Petition, pp. 28-29). By adding Section 8(c), Congress unequivocally declared that an employer's expression could no longer constitute an unfair labor practice unless the expression contained a threat or promise.

However, the Board traditionally has ignored the admonition of this Court and the congressional intent embodied in Section 8(c) and chosen to find that any expression raising any likelihood of union disaffiliation constitutes a *per se* violation of the Act regardless of the absence of threat or promise.

All the courts of appeal, prior to the decision of the court below, which have considered the question

of the right of an employer to advise its employees of the right to withdraw from union affiliation and provide means to do so have held the employer's actions to be permissible in the absence of coercion.

In Federation of *Union Representatives v. NLRB*, 339 F. 2d 126 (C.A.2, 1964), the court found that the employer's solicitation of resignations from the union by means of a face-to-face conversation without threat of reprisal or promise of benefit was permissible.

In *NLRB v. Brookside Industries, Inc.*, 308 F.2d 224 (C.A.4, 1962), the employer's personnel director advised some employees of how to revoke their authorization cards. The court ruled that because there had been no unlawful threats or promises such activity was protected.

On three prior occasions, the court below has considered the issue before this Court. In each case it has denied enforcement of the Board's order.

In *NLRB v. Sun Co. San Bernardino*, 215 F.2d 379 (C.A.9, 1954), the employer advised his employees that they could cancel authorization cards by writing to the union. The court found that because the conduct contained no threat of reprisal or force or promise of benefit, there was no unfair labor practice and the conduct was protected by Section 8(c) of the Act.

In *NLRB v. The Deutsch Company*, 408 F.2d 684 (C.A.9, 1969), the issue before the court was, as in this case, the lawfulness of informing employees by letter of their right to withdraw authorization cards. The court held that the proscriptions of the Act were not intended to encompass trivial behavior when first amendment rights were jeopardized.

In *S. H. Kress & Co. v. NLRB*, 317 F.2d 225 (C.A. 9, 1963), employees reported to their employer that they did not believe that 30% of the employees had signed cards. Thereafter, the employer interviewed *individually* substantially all of the unit petitioned for by the union. The interviews were conducted in a closed storeroom area. Each employee was handed a mimeographed form which stated in the alternative that he had not signed for the union or that he had signed an authorization card and wanted it revoked, and was asked to sign one or the other in front of management representatives. The order of the Board was set aside on the grounds that the employer's acts were non-coercive and should even be encouraged as an aid to employees in exercising their Section 7 rights.

B. In Conformance With Its Prior Policy the Board Found the Subject Communication to Be a Violation of the Act While Conceding That the Letters Did Not Contain Any Threat of Reprisal, Force or Benefit.

The Board in the instant case conceded that the communication contained no threat or promise; nonetheless, the court below adopted the Board's position that the letters constituted a *per se* violation of the Act.

The petitioner sent its employees a letter which indicated that if they had been misinformed, coerced or intimidated into signing an authorization card or the authorization card was a forgery, they could revoke it by a particular method. The letters were not coercive and the Board makes no such contention.

The petitioner was scrupulously careful in avoiding any threat or promise. In fact, rather than merely avoiding making any threat or promise, which is all

that Section 8(c) requires in order to preserve free speech protection (see *Federation of Union Representatives v. NLRB, supra; NLRB v. Brookside Industries, Inc., supra; NLRB v. Sun Co. San Bernardino, supra*), the petitioner made absolutely certain that no employee would feel intimidated or threatened in deciding whether to withdraw his card. The enclosed postcard was addressed to the Board's Regional Office and simply stated the sender's desire to revoke his authorization card. The postcard was not returnable to the petitioner. The employees were not required to indicate to the petitioner whether the postcards were sent, and the employees were not asked what they had chosen to do with the postcards. With this knowledge, the employees could exercise their rights freely and without fear because they knew that the petitioner had no way of knowing what action, if any, the employee had taken with respect to the cards; therefore, there was no possibility of coercion or interference with the right of the employees to exercise their freedom of choice.

C. The Court Below Was the First Court to Hold as a Matter of Law That a Communication Which May Result in Union Disaffiliation Is Unlawful Regardless of Threat or Promise.

The court below held the sending of the letters to be a *per se* violation of the Act and sought to justify its holding by adopting the Board's rationale that "*an employer cannot engage in conduct calculated to erode employee support for the union.*"

It is respectfully submitted that this is no rationale at all. It is undisputed that it is not the undermining of employees' support of the union that is contrary to the law but the manner, method and approach used

in doing so which makes a particular act violative; *i.e.*, an expression containing a threat of reprisal or force or promise of benefit. It is undisputed that such activities as accusing the union of trying to take away promised wage increases (*NLRB v. Gotham Industries*, 406 F.2d 1306 (C.A.1, 1969)); warning employees of union trickery and that unionization means strikes and loss of jobs (*NLRB v. Hawthorne Co.*, 404 F.2d 1205 (C.A.8, 1969)); informing employees that the union had deprived the store of heat and had secreted purported authorization cards from impartial persons as a check of majority status (*NLRB v. L. L. Brandeis & Sons*, 145 F.2d 556 (C.A.8, 1944)); telling employees that signatures on authorization cards would not be kept secret (*NLRB v. Hobart Brothers Co.*, 372 F.2d 203 (C.A.6, 1967)), and all other communications attacking unionization are lawful if unaccompanied by threat or promise.

D. The Presently Constituted Board Has Altered Its Position to Conform With the Directive of Section 8(c) by Finding That Informing Employees of Their Right to Disavow Union Support and Affirmatively Providing the Means to Do so Is Not a Violation of the Act in the Absence of Threat or Promise.

Since the decision of the Board in this case there has been a complete change in the personnel of the Board. The presently constituted Board in *Gaf* rejected the Trial Examiner's decision and conclusively held, in a factual situation less neutral than the instant case, that in the absence of threat or promise an employer may advise employees of their right to withdraw from a union and provide the means to do so. A true and

correct copy of the pertinent part of the *Gaf* decision as reported in 1972 CCH, NLRB paragraph No. 23,853, is attached hereto as an appendix.

In *Gaf*, an employer suggested that employees form a separate grievance committee as a means of bargaining collectively rather than continuing to give majority support to a union. Further, the employer informed the employees of their right to file a decertification petition, typed up the decertification petition for the employees, and allowed the employees to circulate the decertification petition in the plant in violation of a company rule. The Board in reversing the Trial Examiner's decision found the activities to be lawful because as found by the Trial Examiner, these activities were not accompanied by any promises or threats. Certainly the facts in the instant case conclusively evidence the employer's greater neutrality in preserving for the employees an atmosphere clinically free of coercion in deciding to remain or withdraw from the union (see Petition, pp. 4-9).

As the record now stands there is no possible way an employer can, with any degree of assurance, determine what information he may legally transmit to his employees with regard to their rights to withdraw from a union. The disorientation created by the flip-flopping of the position of the Board and the courts can only lead to overcautiousness by employers with a concomitant diminution in the employees' right to receive and utilize information in deciding whether or not to remain union members. The result will be to discourage communications which admittedly are intended to undermine union support, previously held to be lawful absent coercion. These include predictions of loss of work, harder work, and plant closure with unionization

(*NLRB v. Golub Corp.*, 388 F.2d 921 (C.A.2, 1967)); conclusions that employees would lose rather than benefit from union representation (*NLRB v. Modern Plating Co.*, 358 F.2d 46 (C.A.7, 1966)); opinions that with unionization would come loss of customers and increasing costs (*P. R. Mallory & Co. v. NLRB*, 389 F.2d 704 (C.A.7, 1967)); indicating that the employer would deal hard with the union if the union was successful (*NLRB v. Wilson Lumber Co.*, 355 F.2d 426 (C.A.8, 1966)); and impressing upon employees that unionization would disrupt employer-employee relationships and subject employee job security to the whims of union leaders (*NLRB v. TRW-Semiconductors*, 385 F.2d 753 (C.A.9, 1967)).

Only this Court can render desperately needed guidance.

Conclusion.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

LEON M. COOPER,
Counsel for Petitioner.

Certificate of Counsel.

I, LEON M. COOPER, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

LEON M. COOPER,
Counsel for Petitioner.

APPENDIX.

[¶23,853] GAF CORPORATION and INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, LOCAL 819.

195 NLRB No. 11, Case Nos. 16-CA-4280 and 16-CA-4328, Robert E. Mullin, Trial Examiner.

¶23,853

January 28, 1972

Before MILLER, KENNEDY and FANNING.

Arthur J. Riggs, Louis P. Bickel and Robert H. Bliss, Dallas, Tex. and Paul Weiner, New York, N.Y. for Employer, LeRoy Neally, Fort Worth, Tex., Business Representative for Union, Phillip R. Jones and Robert A. Gritta for NLRB.

Interference—Fact Finding—Suggesting Formation of Employee Committee

On the facts, an employer unlawfully interfered with employees' rights by suggesting that employees who were represented by a union form their own grievance committee. Section 8(a)(1).

Interference—Encouragement of Decertification Petition—Advice as to Legal Rights

An employer did not unlawfully interfere with employees' rights through conversations between a production supervisor and employees over possible circulation of a decertification petition, since *the employees were merely advised, in response to their questions, of their rights* as to the petition and the necessity for preliminary employee support. Section 8(a)(1).—Back reference ¶3830.835.

Doubt of Union Majority—Good Faith—Decertification Petition—Signing by Majority

An employer did not fail to meet its bargaining duty by withdrawing recognition of and refusing to bargain with a union, since the doubt of the union's majority status was based on the knowledge that a majority of its employees had signed a decertification petition and had not been coerced into doing so. Section 8(a)(5). — Back reference ¶ 3046.064

Interference—Fact Finding—Threats and Promises

On the facts, there was *insufficient evidence to show that an employer had unlawfully interfered with employees' rights by promising benefits* for withdrawing from a union *or by threatening reprisals against employees* who helped in a Board investigation. Section 8(a)(1).

Trial Examiner's Findings and Conclusions

An employer, engaged in the manufacture of photographic films and paper, is charged with having violated Section 8(a)(1) and (5) of the Act by suggesting that employees form their own union and circulate a decertification petition, and by withdrawing recognition from the union certified as the exclusive bargaining representative of its employees.

Evidence showed that the employer, through its production supervisor Trebilcock, urged an employee to circulate a petition for a decertification election among employees. He also suggested that the employees form their own grievance committee. Such activity is interference with employees' rights and is violative of Section 8(a)(5) of the Act, since it interferes with the free choice of bargaining representative.

Board's Decision

The Board affirms the Trial Examiner's decision only to the extent consistent with the following findings.

It is found that the employer did not violate Section 8(a)(1) of the Act by suggesting the circulation of a decertification petition. The conversations about the petition that took place between Trebilcock and one of the employees who circulated the petition concerned the employee's questions about how the petition should be drawn up. They were initiated by the employee. Trebilcock *did no more than inform the employee of his legal right to file a decertification petition and* of the preliminary requirement of employee support.

The statements concerning the petition were not connected with the employer's unlawful suggestion made a month previously, but never implemented, that employees form a separate grievance committee.

The Trial Examiner's finding that the employer unlawfully ceased to recognize and bargain with the union is overruled. While the filing of a decertification petition does not provide sufficient grounds for a good faith doubt of an incumbent union's representative status, as such a petition need only be supported by 30 percent of the employees, the petition signed by an uncoerced majority of employees does provide such grounds.

In the instant case, the employer knew the petition had been signed by a majority of the employees. Moreover, it has been found that the employees were not unlawfully induced to sign the petition.

The one remaining violation, the suggestion that the employees form their own grievance committee, did not affect the union's majority status or cause employee

disaffection. It therefore stands as an independent violation and does not affect the Board's finding of no unlawful refusal to bargain.

Even though the petition was typed with a company typewriter and was circulated without difficulty in apparent violation of a rule against employees being at the plant when off duty, it was not tainted. The rule was rarely enforced, and there was no rule against solicitation.

Accordingly, the petition was free of unlawful employer interference. Therefore, the employer had objective grounds for doubting the union's continuing majority status. No violation of Section 8(a)(5) is found.

Dissenting Opinion

Member Fanning would find that the suggestion of forming an employees' committee and the decertification petition were closely related. Thus, in his opinion, the petition was tainted and could not be relied upon by the employer as a basis for a good-faith doubt of the union's majority status. Accordingly, the Trial